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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILD FISH CONSERVANCY; WILD STEELHEAD COALITION; FEDERATION OF FLY FISHERS STEELHEAD COMMITTEE; and WILD SALMON RIVERS d/b/a CONSERVATION ANGLER Plaintiffs, v. NATIONAL PARK SERVICE; JONATHAN B. JARVIS, in his official capacity as the Director of the National Park Service; UNITED STATES DEPARTMENT OF THE INTERIOR; KENNETH L. SALAZAR, in his official capacity as the Secretary of the United States Department of the Interior; UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, in his official capacity as the Director of the United States Fish and Wildlife Service; UNITED STATES DEPARTMENT OF COMMERCE; JOHN E. BRYSON, in his official capacity as the Secretary of the United States Department of Commerce; NOAA FISHERIES SERVICE; SAMUEL D. RAUCH III, in his official capacity as	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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the Acting Assistant Administrator for Fisheries of NOAA Fisheries Service; ROBERT ELOFSON, in his official capacity as the Director of the River Restoration Project for the Lower Elwha Klallam Tribe; LARRY WARD, in his official capacity as the Hatchery Manager and Fisheries Biologist for the Lower Elwha Klallam Tribe; DOUG MORRILL, in his official capacity as the Fisheries Manager for the Lower Elwha Klallam Tribe; and MIKE MCHENRY, in his official capacity as the Fisheries Habitat Biologist and Manager for the Lower Elwha Klallam Tribe,

Defendants,

INTRODUCTION

1. Congress passed the Elwha River Ecosystem and Fisheries Restoration Act ("Elwha Act"), Pub. L. 102-495, 106 Stat. 3173 (Oct. 24, 1992), in 1992 authorizing the acquisition and removal of the Elwha Dam and the Glines Canyon Dam. The purpose of the Elwha Act was to facilitate the full restoration of the Elwha River ecosystem and native anadromous fisheries. Removal of these two Elwha River dams on the Olympic Peninsula began in late-2011 and will be the largest dam removal project in United States history.

2. The Elwha River Fish Restoration Plan ("Fish Restoration Plan") purports to describe the "scientific framework guiding efforts to return successful, reproducing fish to the Elwha River basin following removal of the Elwha and Glines Canyon dams on the Elwha River."

3. The Fish Restoration Plan calls for large-scale hatchery programs designed to expedite harvest opportunities. The Fish Restoration Plan does not include a clearly articulated

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strategy for phasing out the artificial production of fish in the Elwha River. The Fish Restoration Plan includes the production and release into the Elwha River of non-native Chambers Creek stock steelhead, which is a highly domesticated stock known to have severe adverse impacts on wild native steelhead.

4. Plaintiffs Wild Fish Conservancy, Wild Steelhead Coalition, Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d//b/a Conservation Angler are concerned that implementation of the artificial production programs described in the Fish Restoration Plan will inhibit the recovery of wild salmonids and prevent the full restoration of the Elwha River ecosystem and native anadromous fisheries.

5. This action challenges the failure of the National Park Service and other federal agencies and officials to comply with the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f), the Elwha Act, and the Wilderness Act, 16 U.S.C. §§ 1131-1136, in promulgating, approving, funding, and implementing the Fish Restoration Plan.

6. This action further challenges the failure of officials for the Lower Elwha Klallam Tribe to comply with the ESA in implementing the Fish Restoration Plan.

7. Plaintiffs seek declaratory and injunctive relief requiring Defendants to comply with the ESA, NEPA, the Elwha Act, and the Wilderness Act.

JURISDICTION AND VENUE

8. This Court has jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, section 11(g) of the ESA, 16 U.S.C. § 1540(g), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1346(a)(2) (United States as Defendant). The requested relief is also proper under 28 U.S.C. § 2201 (declaratory relief) and 28 U.S.C. § 2202 (injunctive relief). As

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required by the ESA citizen suit provision, 16 U.S.C. § 1540(g)(2)(A)(i), Plaintiffs provided sixty days notice of their intent to sue through letters dated and postmarked September 16, 2011 and November 16, 2011. Copies of those letters are attached as **Exhibit 1** and **Exhibit 2** to this Complaint.

9. The Western District of Washington is the proper venue under 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A) because the violations alleged, and/or substantial parts of the events and omissions giving rise to the claims, occurred and are occurring within such District.

PARTIES

10. Plaintiff Wild Fish Conservancy is a membership-based 501(c)(3) nonprofit organization incorporated in the State of Washington with its principal place of business in Duvall, Washington. Wild Fish Conservancy is dedicated to the preservation and recovery of Washington's native fish species and the ecosystems upon which those species depend. Wild Fish Conservancy brings this action on behalf of itself and its approximately 2,400 members. Wild Fish Conservancy changed its name from "Washington Trout" in 2007. As an environmental watchdog, Wild Fish Conservancy actively informs the public on matters affecting water quality, fish, and fish habitat in the State of Washington through publications, commentary to the press, and sponsorship of educational programs. Wild Fish Conservancy also conducts field research on wild fish populations and has designed and implemented habitat restoration projects. Wild Fish Conservancy has lobbied, litigated, and publicly commented on federal and state actions that affect the region's native fish and ecosystems. Wild Fish Conservancy routinely seeks to compel government agencies to follow the laws designed to protect native fish species, particularly threatened and endangered species.

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11. Plaintiff Wild Steelhead Coalition is a membership-based 501(c)(3) non-profit organization incorporated in the State of Washington with its principal place of business in Kirkland, Washington. The mission of the Wild Steelhead Coalition is to increase the return of wild steelhead to the waters and rivers of the Pacific Northwest. The Wild Steelhead Coalition brings this action on behalf of itself and its over 500 members and supporters. The Wild Steelhead Coalition, which is staffed entirely by volunteers, advocates for stronger protections and conservation of wild steelhead using the best available science and educates the public about the threats to wild steelhead in the Pacific Northwest. The Wild Steelhead Coalition supports scientific research and scholarships concerning issues affecting wild steelhead, such as interactions between wild and hatchery fish.

12. Plaintiff Federation of Fly Fishers is a membership-based 501(c)(3) non-profit organization incorporated in the State of Montana. The Federation of Fly Fishers is an international organization dedicated to promoting the sport of fly fishing and conservation of recreational resources. The Federation of Fly Fishers Steelhead Committee is a subcommittee of the Federation of Fly Fishers dedicated to the conservation and recovery of wild salmon and steelhead throughout their native range. Since 1986, the Federation of Fly Fishers Steelhead Committee has been a constant voice for the implementation of fisheries management based upon the best available science, which prioritizes the recovery of wild salmonids. The Steelhead Committee's primary missions are to educate the public about the decline of wild steelhead and to advocate for sound management and protection of wild steelhead.

13. Plaintiff Wild Salmon Rivers, d/b/a the Conservation Angler, is a non-profit 501(c)(3) organization incorporated in Washington with its principal place of business in Edmonds, Washington. The mission of the Conservation Angler is to promote the protection of

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wild salmonids throughout their entire range, including habitat in Russia. Additionally, the Conservation Angler supports research, education, and restoration projects in the United States and Russia.

14. Plaintiffs' members regularly spend time in areas in and near the Elwha River that are adversely affected by Defendants' violations addressed in this Complaint. Plaintiffs' members intend to continue to visit these areas on a regular basis, including in the summer of 2012 and beyond. These members observe, study, photograph, and appreciate wildlife and wildlife habitat in and around the Elwha River. These members also hike, camp, swim and snorkel in and around the Elwha River. Plaintiffs' members have fished in the Elwha River basin and connected water bodies for native fish species and plan to do so in the future if and when there are opportunities to fish that will not impede wild fish population conservation and restoration.

15. Plaintiffs' members derive scientific, educational, recreational, health, conservation, spiritual, and aesthetic benefits from the Elwha River and the surrounding area, from native fish species in Elwha River and other species that depend on such native fish species, and from the existence of a natural, wild and healthy Elwha River ecosystem.

16. Plaintiffs and their members have suffered procedural and informational harms connected to their substantive, conservation, recreation, and scientific activities resulting from Defendants' violations. Plaintiffs and their members rely, in part, on ESA consultation and NEPA evaluation processes to provide public information, protect threatened and endangered species and prevent environmental harms. Defendants' failure to comply with these statutes in promulgating, approving, funding, and implementing the Fish Restoration Plan and the activities described therein has deprived Plaintiffs and their members of public comment opportunities and

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public information, thereby harming their efforts to effectively advocate for and protect their interests.

17. The past, present, and future enjoyment of Plaintiffs' interests and those of their members, including the recreational, aesthetic, spiritual, and scientific interests, have been, are being, and will continue to be harmed by Defendants' failures to comply with applicable laws as described herein and by Plaintiffs' members' reasonable concerns related to Defendants' violations. These injuries include reduced enjoyment of time spent in the Elwha River area and fewer visits to the area than would otherwise occur.

18. Plaintiffs' injuries and those of its members are actual, concrete and/or imminent, and are fairly traceable to Defendants' violations of applicable laws as described herein that the Court may remedy by declaring that Defendants' omissions and actions are illegal and issuing injunctive relief requiring Defendants to comply with their statutory obligations. Plaintiffs' members will benefit from increased enjoyment of time spent in the Elwha River area and/or will visit the area more frequently if the Defendants are required by the Court to comply with the statutes addressed in this Complaint.

19. Defendant National Park Service is a bureau of the United States Department of the Interior and is responsible for the operations and management of national parks. Many of the activities complained of herein occur within, and/or adversely affect, portions of the Elwha River ecosystem located with the Olympic National Park. The National Park Service is the lead federal agency responsible for compliance with NEPA and the ESA in relation to the Elwha River dam removal project. One or more representative of the National Park Service participated in the development of the Fish Restoration Plan.

20. Defendant Jonathan B. Jarvis is the Director of the National Park Service.

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21. Defendant United States Department of the Interior is a federal agency within the executive branch. Defendants National Park Service and United States Fish and Wildlife Service are sub-agencies, or "bureaus," within the United States Department of the Interior, and the Department of the Interior is therefore ultimately responsible for the actions of those bureaus. The Elwha Act authorizes funds to be appropriated to the Secretary of the United States Department of the Interior to carry out the purposes of the Elwha Act.

22. Defendant Kenneth L. Salazar is the Secretary of the United States Department of the Interior.

23. Defendant United States Fish and Wildlife Service is a bureau of the United States Department of the Interior. The United States Fish and Wildlife Service is responsible for implementing the ESA with respect to certain species, including threatened bull trout. One or more representatives of the United States Fish and Wildlife Service participated in the development of the Fish Restoration Plan.

24. Defendant Daniel M. Ashe is the Director of the United States Fish and Wildlife Service.

25. Defendant United States Department of Commerce is a federal agency within the executive branch. Defendant NOAA Fisheries Service is a sub-agency within the United States Department of Commerce, and United States Department of Commerce is therefore ultimately responsible for the actions of NOAA Fisheries Service. The Elwha Act authorizes funds to be appropriated to the Secretary of the United States Department of Commerce for expenditure through NOAA Fisheries Service to carry out the purposes of the Elwha Act.

26. Defendant John E. Bryson is the Secretary of the United States Department of Commerce.

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27. Defendant NOAA Fisheries Service, also known as the National Marine Fisheries Service, is a sub-agency within the United States Department of Commerce. NOAA Fisheries Service is responsible for implementing the ESA with respect to certain species, including threatened Puget Sound Chinook salmon, threatened Puget Sound steelhead, and endangered South Resident Killer Whale. One or more representatives of NOAA Fisheries Service participated in the development of the Fish Restoration Plan.

28. Defendant Samuel D. Rauch III is the Acting Assistant Administrator for Fisheries of NOAA Fisheries Service.

29. Defendant Robert Elofson is the Director of the River Restoration Project for the Lower Elwha Klallam Tribe.

30. Defendant Larry Ward is the Hatchery Manager and Fisheries Biologist for the Lower Elwha Klallam Tribe. Mr. Ward is listed as a co-author of the Fish Restoration Plan.

31. Defendant Doug Morrill is the Fisheries Manager for the Lower Elwha Klallam Tribe.

32. Defendant Mike McHenry is the Fisheries Habitat Biologist and Manager for the Lower Elwha Klallam Tribe.

BACKGROUND

I. The Legal Framework.

A. The Endangered Species Act.

33. The ESA is a federal statute enacted to provide a program to conserve threatened and endangered species and to protect the ecosystems upon which those species depend. 16. U.S.C. § 1531(b). "Conserve," as used is in the ESA, means to use all methods and procedures

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necessary to bring threatened and endangered species to a point where the protections afforded by the statute are no longer necessary. 16 U.S.C. § 1532(3).

34. Section 4 of the ESA requires the Secretaries of the United States Department of the Interior and the United States Department of Commerce to determine whether species are threatened or endangered of extension and to list species as such under the statute. 16 U.S.C. §§ 1533(a)(1) and (c)(1). Such a listing triggers various protective measures intended to conserve the species, including the designation of critical habitat and the preparation of a recovery plan. 16 U.S.C. §§ 1533(a)(3) and (f).

35. Section 9 of the ESA and its implementing regulations make it unlawful for any person to "take" threatened and endangered species. 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 223.203(a); 50 C.F.R. § 17.31(a).

36. "Take" is defined broadly under the ESA to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

37. Harass is defined to include an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. 50 C.F.R. § 17.3.

38. Harm is defined to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3; 50 C.F.R § 222.102.

39. Section 7(a)(2) of the ESA requires that each federal agency, in consultation with the Secretaries of the United States Department of the Interior and/or the United States

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Department of Commerce, insure that any action authorized, funded, or carried out by such agency (the "action agency") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat of such species. 16 U.S.C. § 1536(a)(2).

40. The Secretaries of the United States Department of the Interior and the United States Department of Commerce have delegated these consultation duties to the Director of the United States Fish and Wildlife Service and the Assistant Administrator for Fisheries of NOAA Fisheries Service (the "consulting agencies"), respectively.

41. In fulfilling the consultation requirements of section 7(a)(2) of the ESA, each agency is required to use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2).

42. Regulations implementing section 7 of the ESA define "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

43. To carry out the mandate of section 7(a)(2) of the ESA, the action agency must consult with the consulting agencies whenever a proposed action may affect a species listed as threatened or endangered under the ESA or its critical habitat. 50 C.F.R. § 402.14(a).

44. Formal consultation under section 7 of the ESA requires the consulting agencies to review all relevant information, evaluate the current status of the listed species or critical habitat, evaluate the effects of the action and cumulative effects on the listed species and critical habitat, formulate a biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction

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or adverse modification of critical habitat, identify reasonable and prudent alternatives if such jeopardy is found, and formulate an incidental take statement. 50 C.F.R. § 402.14(g); *see also* 16 U.S.C. §§ 1536(b)(3)(A) and (4).

45. The biological opinion must include a summary of the information upon which the opinion is based, a detailed discussion of the effects of the action, and if jeopardy is found, reasonable and prudent alternatives to the action that will avoid jeopardy. 50 C.F.R. § 402.14(h).

46. If the consulting agencies determine that jeopardy is not likely, or that reasonable and prudent alternatives to the proposed action will avoid jeopardy, and that any taking of listed species incidental to the proposed action will not violate section 7(a)(2) of the ESA, the consulting agencies must also issue an incidental take statement with the biological opinion. 16 U.S.C. 1536(b)(4).

47. The incidental take statement is to specify the impact of incidental taking on the species, those reasonable and prudent measures that the consulting agencies consider necessary or appropriate to minimize impacts, and the terms and conditions that must be complied with to implement such reasonable and prudent measures. 16 U.S.C. § 1536(b)(4).

48. Any take of a listed species by an action agency in compliance with an incidental take statement is not a prohibited take under section 9 of the ESA. 16 U.S.C. §§ 1536(b)(4) and (o)(2); 50 C.F.R.§ 402(i)(5).

49. Agencies are required to reinitiate consultation if the amount or extent of incidental take specified by an incidental take statement is exceeded, if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological

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opinion, or if a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

50. Section 7(a)(2) of the ESA includes, in addition to the consultation obligations, a substantive duty requiring federal agencies to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.

51. Section 10 of the ESA provides a mechanism by which NOAA Fisheries Service and the United States Fish and Wildlife Service may issue permits authorizing the take of threatened or endangered species associated with activities intended to enhance the propagation or survival of the affected species. 16 U.S.C. § 1539(a)(1)(A). Such permits are issued upon consideration of several factors, including the effects the activity would have on wild populations and whether the proposed activity would conflict with other programs intended to enhance the survival probabilities of the species. 50 C.F.R. § 17.22(a)(2); 50 C.F.R. § 222.308(c).

52. Section 10 of the ESA also allows for the issuance of permits authorizing the take of threatened or endangered species incidental to projects determined by NOAA Fisheries Service or the United States Fish and Wildlife Service not to appreciably reduce the likelihood of survival and recovery of the protected species. 16 U.S.C. § 1539(a)(2)(B)(iv); 50 C.F.R. § 222.307(c)(2)(iii); 50 C.F.R. § 17(b)(2)(i)(D). Parties seeking such a permit are required to develop a habitat conservation plan that will minimize adverse effects to ESA-listed species. 16 U.S.C. § 1539(a)(2)(A); 50 C.F.R. § 17.22(b)(1)(iii); 50 C.F.R. § 222.307(b)(5).

53. NOAA Fisheries Service has promulgated regulations under the authority of section 4(d) of the ESA that exempt certain activities from the "take" prohibition otherwise

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applied to threatened anadromous fish under its jurisdiction. 50 C.F.R. § 223.203. One such exemption is for artificial propagation programs for which a Hatchery Genetic Management Plan has been approved by NOAA Fisheries Service as meeting detailed criteria. 50 C.F.R. § 223.203(b)(5). Another exemption exists for joint State-Tribe resource management plans implementing treaty fishing rights that have undergone a NOAA Fisheries Service review and approval process. 50 C.F.R. § 223.203(b)(6).

B. The National Environmental Policy Act.

54. The purpose of NEPA is, *inter alia*, to declare a national policy that will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the Nation. 42 U.S.C. § 4321.

55. NEPA requires federal agencies to undertake processes to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken" and that are "intended to help public officials make decisions that are based on understanding of environmental consequences." 40 C.F.R. §§ 1500.1(b) and (c).

56. To accomplish these purposes, NEPA requires federal agencies to prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

57. The "detailed statement," commonly known as an environmental impact statement ("EIS"), must describe the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and

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the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

58. If a proposed action is nether one that normally requires an EIS or that normally does not require an EIS, the agency must prepare an environmental assessment ("EA") to determine whether an EIS is required. 40 C.F.R. §§ 1501.4(a) and (b).

59. If the agency determines through the EA process that an EIS is not required for the proposed action, then the agency is required to issue a finding of no significant impact ("FONSI"). 40 C.R.F. § 1501.4(e).

60. Regulations promulgated by the Council on Environmental Quality ("CEQ") direct agencies to consider certain factors when considering whether a particular proposed action requires preparation of an EIS, including, *inter alia*, whether the action may adversely affect an endangered or threatened species listed under the ESA or its critical habitat. 40 C.F.R. § 1508.27.

61. NEPA further provides that agencies "shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

62. An agency is required to supplement an EIS that has been completed if the agency subsequently makes substantial changes in the proposed action that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c).

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C. The Elwha Act.

63. The Elwha Act was signed into law in 1992 and mandates the full restoration of the Elwha River ecosystem and native anadromous fisheries.

64. The Elwha Act authorized the Secretary of the United States Department of the Interior to acquire and remove the Elwha Dam and Glines Canyon Dam upon a finding that dam removal is "necessary for the full restoration of the Elwha River ecosystem and native anadromous fisheries." Pub. L. 102-495, § 3(a), 106 Stat. 3173, 3174 (1992).

65. The Elwha Act authorized the Secretary of the United States Department of the Interior, upon the requisite findings, to take such actions as are necessary "for the removal of the dams and full restoration of the Elwha River ecosystem and native anadromous fisheries." Pub. L. 102-495, § 4(a)(1), 106 Stat. 3173, 3177 (1992).

66. The Elwha Act further authorized the appropriation of funds to the Secretaries of the United States Department of the Interior and the United States Department of Commerce to carry out the purposes of the Elwha Act. Pub. L. 102-495, § 9, 106 Stat. 3173, 3178-79 (1992).

D. The Wilderness Act.

67. The Wilderness Act was enacted in 1964 and established the National Wilderness Preservation System "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition." 16 U.S.C. §§ 1131(a).

68. The Wilderness Act provides standards and procedures for designating "wilderness areas" and requires that areas so designated be administered "for the use and

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enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness." 16 U.S.C. §§ 1131(a) and 1132.

69. The Wilderness Act defines a "wilderness, in contrast with those areas where man and his own works dominate the landscape, … as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain…, an area…retaining its primeval character and influence…, [and] which is protected and managed so as to preserve its natural conditions..." 16 U.S.C. § 1131(c).

70. Agencies administering designated wilderness areas are responsible for preserving the wilderness character of the area. 16 U.S.C. § 1133(b).

71. The Wilderness Act prohibits commercial enterprises within any wilderness area, subject to limited exceptions. 16 U.S.C. § 1133(c). Commercial activities may be permitted within wilderness areas "to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas." 16 U.S.C. § 1133(d)(5).

72. The Wilderness Act prohibits the use of motor vehicles, motorized equipment, the landing of aircraft, and other forms of mechanical transport except as necessary to meet the minimum requirements for the administration of the area for the purposes of the Wilderness Act. 16 U.S.C. § 1133(c).

E. The Administrative Procedure Act.

73. The APA authorizes judicial review of actions taken by federal agencies. 5 U.S.C. § 702.

74. The APA provides that the reviewing Court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

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II. Factual Background.

A. The Elwha River Ecosystem.

75. President Grover Cleveland designated large portions of the Olympic Peninsula as the Olympic Forest Preserve in 1897. President Theodore Roosevelt declared much of the area a national monument in 1909. The Olympic National Park was designated in 1938, expanded in 1953 to include coastal areas, and currently consists of approximately 922,651 acres. Approximately 95% of the Olympic National Park was designated a wilderness area under the Wilderness Act in 1988, known as the Olympic Wilderness. Pub. L. 100-668, 102 Stat. 3961 (Nov. 16, 1988).

76. The Elwha River is approximately forty-five miles in length, located on the Olympic Peninsula in Washington State, and flows generally north into the Strait of Juan de Fuca near Port Angeles, Washington.

77. The Elwha River watershed encompasses approximately 321 square miles, of which approximately 267 square miles are within the boundaries of the Olympic National Park.

78. The Elwha Dam was constructed on river mile ("RM") 4.9 of the Elwha River and has blocked upstream anadromous fish passage to more than 70 miles of mainstem and tributary habitat since 1911. The dam was constructed without fish passage facilities.

79. The Glines Canyon Dam was constructed on RM 13.4 of the Elwha River in 1927. The Glines Canyon Dam was also built without fish passage facilities and therefore blocks fish passage.

80. Before construction of the dams, the Elwha River supported several species of anadromous fish, including salmon, steelhead, and bull trout. The Elwha River was one of the most productive salmon streams in the Pacific Northwest.

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81. Anadromous fish returning to spawn in the Elwha River and its tributaries have been confined to the lower 4.9 miles of the river below the Elwha Dam since 1911. The numbers of Elwha River native anadromous fish have declined drastically as a result.

82. The majority of the Elwha River system is within the Olympic National Park and the Olympic Wilderness and remains in a pristine condition due to its protected status.

B. Elwha River Restoration and NEPA Processes.

83. The United States Department of the Interior, in conjunction with other agencies, submitted the Elwha Report to Congress in June of 1994 determining that the removal of the Elwha and Glines Canyon Dams was feasible and necessary under the Elwha Act to achieve full restoration of the Elwha River ecosystem and native anadromous fisheries.

84. The Elwha River Ecosystem Restoration EIS was prepared in 1995. This was a programmatic EIS evaluating dam removal alternatives, including complete dam removal, dam retention with installation of fish passage facilities, and no action. The National Park Service was the lead agency for the NEPA process, while cooperating agencies included the United States Fish and Wildlife Service. The preferred alternative selected in the EIS was complete removal of both dams.

85. The Elwha River Ecosystem Restoration EIS did not evaluate alternatives for the recovery of native anadromous fisheries.

86. The Elwha River Ecosystem Restoration Implementation EIS was prepared in 1996. This implementation EIS evaluated alternatives for the safe, environmentally sound, and cost-effective removal of the Elwha and Glines Canyon dams. The National Park Service was the lead agency for the NEPA process, while cooperating agencies included the United States Fish and Wildlife Service.

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87. The Elwha River Ecosystem Restoration Implementation EIS did not evaluate alternatives for the recovery of native anadromous fisheries.

88. In response to a public comment, the Elwha River Ecosystem Restoration Implementation EIS stated that the indigenous rainbow trout population in the upper Elwha River is the broodstock of choice for restoring steelhead. This EIS further provided that "Fish derived from Chambers Creek or Skamania steelhead would not be released into the newly accessible reaches of the Elwha."

89. A Supplemental EIS was prepared for the Elwha River Ecosystem Restoration Implementation EIS in 2005. This document was prepared because the United States Department of the Interior proposed several additional measures not considered in the 1996 EIS.

90. The 2005 Elwha River Ecosystem Restoration Implementation Supplemental EIS did not evaluate alternatives for the recovery of native anadromous fisheries.

91. Removal of the Elwha and Glines Canyon dams began in late 2011.

C. <u>The Fish Restoration Plan</u>.

92. The first drafts of the Fish Restoration Plan appeared with the Elwha Report submitted to Congress under the Elwha Act in 1994 and as an appendix to the Elwha River Ecosystem Restoration Implementation EIS completed in 1996. These early versions described various options for restoring native anadromous stocks of the Elwha River fish, including natural recolonization for some species. The 1996 Fish Restoration Plan stated that all options described therein would continue to be investigated.

93. Numerous drafts of the Fish Restoration Plan were subsequently prepared by the Elwha Fisheries Technical Group.

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94. The Elwha Fisheries Technical Group includes representatives of NOAA Fisheries Service, the National Park Service, the United States Fish and Wildlife Service, and the Lower Elwha Klallam Tribe.

95. The final Fish Restoration Plan was completed in April 2008.

96. The Fish Restoration Plan purports to describe the strategies that will be employed to restore fish populations to the Elwha River in conjunction with dam removal, including identification of fish stocks, artificial propagation methods, and planting locations. The plan also purports to describe population recovery objectives and monitoring and adaptive management methods.

97. The Fish Restoration Plan describes extensive artificial production programs for several fish species primarily using two hatchery facilities. The plan states that a hatchery referred to as the Elwha Rearing Channel will produce Chinook salmon. The plan states that the hatchery operated by the Lower Elwha Klallam Tribe will produce coho, chum and pink salmon and steelhead.

98. The hatchery programs described in the Fish Restoration Plan include several supplementation programs, whereby significant numbers of hatchery produced fish will be released in the Elwha River in a purported effort to "jump-start" the recolonization of the river above the former dam sites. These include programs utilizing a native, natural-origin winter steelhead from the Elwha River and a composite Elwha River stock of Chinook salmon.

99. The Fish Restoration Plan includes a hatchery program utilizing the non-native, highly domesticated, Chambers Creek stock of steelhead.

100. The Fish Restoration Plan describes large-scale levels of artificial fish production, especially for Chinook and coho salmon and steelhead. Such production levels far exceed that

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necessary or appropriate for conservation and recovery purposes, and are intended to facilitate commercial-level harvests on an expedited schedule. Certain activities taken in furtherance of these commercial objectives will occur within the Olympic Wilderness, including planting of fish.

101. The Fish Restoration Plan provides for helicopter flights and landings within the Olympic Wilderness, including many flights each year to plant Chinook salmon in the upper basin of the Elwha River.

102. Upon information and belief, the United States Department of Commerce, including NOAA Fisheries Service, has authorized, implemented (in part), and/or funded (in part) the activities described in the Fish Restoration Plan, and is continuing to do so. Such actions include participation in the development and issuance of the Fish Restoration Plan.

103. Upon information and belief, the United States Department of the Interior, including the National Park Service and the United States Fish and Wildlife Service, has authorized, implemented (in part), and/or funded (in part) the activities described in the Fish Restoration Plan, and is continuing to do so. Such actions include participation in the development and issuance of the Fish Restoration Plan. Such funding includes approximately $16.4 million from the United States Department of the Interior in 2009 to construct the hatchery operated by the Lower Elwha Klallam Tribe, which was completed in 2011. Such authorizations include allowing the planting of fish and the flying and landing of helicopters within the Olympic National Park and the Olympic Wilderness. The operation and maintenance costs for the Chinook salmon hatchery facilities described in the Fish Restoration Plan are funded by the National Park Foundation, which is the congressionally-chartered non-profit partner of the National Park Service. Upon information and belief, the United States Department of the

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Interior and/or one or more sub-agencies thereof fund the operation and maintenance costs associated with the Lower Elwha Klallam Tribe hatchery facilities.

104. Upon information and belief, the Lower Elwha Klallam Tribe is implementing many of the activities described in the Fish Restoration Plan, including the Chambers Creek and other steelhead programs, and the coho, chum and pink salmon programs.

105. The federal Defendants involved in preparing, authorizing, funding, and/or implementing the Fish Restoration Plan have not prepared an EIS, an EA, a FONSI, an alternatives analysis, or any other NEPA processes related to such action.

D. ESA Listed Species and Designated Critical Habitat.

106. The Puget Sound Chinook salmon evolutionary significant unit is listed as a threatened species under the ESA. 64 Fed. Reg. 14,308 (March 24, 1999); 70 Fed. Reg. 37,160 (June 28, 2005). Critical habitat has been designated for this species. 70 Fed. Reg. 52,630 (Sept. 2, 2005).

107. The Puget Sound steelhead distinct population segment is listed as a threatened species under the ESA. 72 Fed. Reg. 26,722 (May 11, 2007).

108. The Southern Resident Killer Whale distinct population segment is listed as an endangered species under the ESA. 70 Fed. Reg. 69,903 (Nov. 18, 2005).

109. The coterminous United States population of bull trout is listed as a threatened species under the ESA. 64 Fed. Reg. 58,910 (Nov. 1, 1999). Critical habitat was designated for threatened bull trout in 2005, 70 Fed. Reg. 56,212 (Sept. 26, 2005), and then expanded in 2010, 75 Fed. Reg. 63,898 (Oct. 18, 2010).

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E. Harm Caused to Native Wild Fish from the Fish Restoration Plan.

110. Hatchery programs harm wild native fish through a variety of mechanisms. This occurs whether non-native stocks are used, such as the Chambers Creek steelhead, or local stocks are used in a supplementation program.

111. The best-available science indicates that supplementation programs using local stocks of fish threaten the reproductive fitness and genetic diversity of the local wild populations they are intended to help and thereby harm, and may prevent, the recovery of such species. Such programs can cause returning adults to have lower reproductive fitness than the original natural-origin (wild) adults. Studies have demonstrated that supplementation of Chinook salmon and steelhead results in such reduced reproductive fitness. Studies have also shown that both non-native stocks and local stocks of steelhead produced in hatcheries lower their genetic adaptation through domestication selection, resulting in fish better suited for hatchery production than wild survival in rivers and oceans. Deleterious impacts to the fitness and genetics of wild stocks from supplementation programs using local wild stocks are particularly well-established for steelhead.

112. Releasing non-native Chambers Creek steelhead poses genetic risks threatening the recovery of wild native steelhead in the Elwha River. Fishing on returning Chambers Creek steelhead stocks, which have been adapted through hatchery selection to an early return fish, has resulted in over harvest and depletion of the early wild steelhead run (December, January). That run was historically equal to or larger than the late winter run (March, April and May). Continued fishing on early returning Chambers Creek steelhead with traditional commercial fishing gear will prevent the recovery of the early wild run steelhead.

113. Releasing hatchery fish also harms wild fish by increasing competition for resources, such as food sources and rearing space. Released hatchery fish can also prey on

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native wild fish, expose them to diseases, and support unnaturally large predator populations, all of which reduce the survival of wild fish.

114. The hatchery programs described in the Fish Restoration Plan will inhibit and/or prevent the recovery wild native salmonids. Hatchery fish released under the Fish Restoration Plan will significantly outnumber wild salmonids, and none of the hatchery-origin fish will be harvested under a five-year moratorium on fisheries in the Elwha River. The large numbers of hatchery-origin spawners that will result pose a severe threat to the recovery of wild salmonids, including ESA-listed Puget Sound Chinook salmon and Puget Sound steelhead.

115. Salmonids are a primary food source for the Southern Resident Killer Whale, particularly Chinook salmon. Activities harming salmonids and salmonid recovery are therefore harmful to the Southern Resident Killer Whale.

116. The hatchery programs described in the Fish Restoration Plan cause "take" of threatened Puget Sound Chinook salmon, threatened Puget Sound steelhead, and threatened bull trout by, *inter alia*, reducing reproductive fitness, increasing competition for resources, preying on ESA-listed fish, and/or exposing ESA-listed fish to diseases. Additionally, the broodstock collection activities described in the Fish Restoration Plan cause "take" of ESA-listed fish by capturing, killing, and/or disrupting migration patterns, including spawning migration patterns.

117. The Fish Restoration Plan does not include an adequate monitoring program to assess the adverse effects from the hatchery programs on the recovery of wild fish.

118. The Fish Restoration Plan does not include a clearly articulated adaptive management strategy to phase out the artificial production of fish in the Elwha River.

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F. ESA Consultations Related to Dam Removal on the Elwha River.

119. United States Fish and Wildlife Service issued a biological opinion dated August 5, 1996 determining that the "Elwha River Restoration Project" is not likely to adversely affect ESA-listed spotted owl, bald eagle, and peregrine falcon, and is not likely to jeopardize the continued existence of marbled murrelet or result in the destruction or adverse modification of its critical habitat.

120. United States Fish and Wildlife Service issued a second biological opinion dated February 24, 2000 related to the "Elwha River Restoration Project." This biological opinion addressed effects to ESA-listed bull trout.

121. United States Fish and Wildlife Service's 2000 biological opinion was prepared before completion of the Fish Restoration Plan in 2008, and therefore did not evaluate the effects of the activities described in the Fish Restoration Plan. However, this biological opinion noted that the Fish Restoration Plan was being developed and referenced a draft of the document. The biological opinion purported to describe some of the activities set forth in the draft Fish Restoration Plan.

122. United States Fish and Wildlife Service concluded in the 2000 biological opinion that the dam removal activities evaluated therein are not likely to jeopardize the continued existence of bull trout.

123. United States Fish and Wildlife Service's 2000 biological opinion included an incidental take statement authorizing the take of ESA-listed bull trout by the National Parks Service (referred to therein as the Olympic National Park) caused by dam removal, construction of flood control, road improvement and water supply measures, and the interim operation of hydroelectric projects prior to dam removal. The incidental take statement does not authorize

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take associated with the activities described in the Fish Restoration Plan, nor does it include reasonable and prudent measures necessary to minimize such take.

124. NOAA Fisheries Service issued a biological opinion under section 7 of the ESA for "Elwha River Ecosystem and Fisheries Restoration" dated November 20, 2006. This biological opinion addressed effects to Puget Sound Chinook salmon and its critical habitat, Puget Sound steelhead (which was proposed for ESA listing at the time), and Southern Resident Killer Whale.

125. NOAA Fisheries Service's 2006 biological opinion was prepared before completion of the Fish Restoration Plan in 2008, and therefore did not evaluate the effects of the activities described in the Fish Restoration Plan. However, this biological opinion cited a 2006 draft of the Fish Restoration Plan and purports to describe some of the activities set forth in the 2006 draft Fish Restoration Plan.

126. NOAA Fisheries Service's 2006 biological opinion focused on the effects of dam removal, and did not evaluate the adverse effects of the activities described in the Fish Restoration Plan, such as the negative impacts hatchery programs have on the recovery of wild anadromous fish. The biological opinion did not use the best scientific and commercial data available related to hatchery programs and the artificial production of fish. The biological opinion did not evaluate whether the activities described in the Fish Restoration Plan are likely to jeopardize the continued existence of protected species or adversely modify their critical habitat. The biological opinion did not evaluate whether the activities described in the Fish Restoration Plan are reasonably expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

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127. NOAA Fisheries Service concluded in the 2006 biological opinion that the dam removal activities evaluated therein are not likely to jeopardize the continued existence of Puget Sound Chinook salmon, Puget Sound Steelhead, or Southern Resident Killer Whale, and are not likely to destroy or adversely modify Puget Sound Chinook salmon critical habitat.

128. NOAA Fisheries Service's 2006 biological opinion included an incidental take statement authorizing the take of Puget Sound Chinook salmon by the National Parks Service caused by the suspension of sediment loads resulting from dam removal activities. The incidental take statement does not authorize take associated with the activities described in the Fish Restoration Plan, nor does it include reasonable and prudent measures necessary to minimize such take.

129. NOAA Fisheries Service's 2006 biological opinion does not include an incidental take statement authorizing the take of Puget Sound steelhead associated with the dam removal activities. The incidental take statement included in the 2006 biological opinion does not quantify the anticipated take of Puget Sound steelhead, nor does it include measures to monitor such take.

130. Attached as Appendix 1 to NOAA Fisheries Service's 2006 biological opinion was a determination by the United States Fish and Wildlife that the proposed action is not likely to destroy or adversely modify bull trout designated critical habitat. The United States Fish and Wildlife Service subsequently submitted a letter to the National Park Service dated May 7, 2007 purporting to transmit an official signature of the responsible official for the United States Fish and Wildlife Service for the Appendix 1.

131. Appendix 1 to NOAA Fisheries Service's 2006 biological opinion evaluates the effects of dam removal activities on bull trout critical habitat designated in 2005. Consultation

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has not been reinitiated to evaluate the effects of dam removal activities on the expanded bull trout critical habitat designated in 2010.

132. Appendix 1 to NOAA Fisheries Service's 2006 biological opinion does not evaluate the effects to bull trout critical habitat associated with the activities described in the Fish Restoration Plan.

133. United States Fish and Wildlife Service issued a memorandum dated January 21, 2010, revising its previous ESA consultation documents. The stated purpose of the revisions was to incorporate the following: changes to the project descriptions and conservation measures requested by the National Park Service; changes to the terms and conditions and reasonable and prudent measures requested by the National Park Service; new survey data; improved analysis of effects to listed species; consequential modifications to anticipated effects to and incidental take of listed species; and new conservation recommendations. This reinitiation of ESA section 7 consultation only addressed these issues, and did not evaluate the effects of the activities described in the Fish Restoration Plan on bull trout and its critical habitat.

134. NOAA Fisheries Service issued a letter dated October 25, 2010 revising its 2006 biological opinion to evaluate the effects of the proposed action on the southern distinct population segment of eulachon, which was listed as a threatened species under the ESA on March 18, 2010. This reinitiation of ESA consultation only addressed effects to this species.

135. The federal Defendants involved in preparing, authorizing, funding, and/or implementing the Fish Restoration Plan have not consulted under section 7 of the ESA regarding such action.

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136. The Defendants involved in preparing, authorizing, funding, and/or implementing the Fish Restoration Plan have not obtained authorization, exception, or exemption for the "take" of species listed as endangered or threatened under the ESA resulting from such action.

137. NOAA Fisheries Service has not issued incidental take permits under section 10 of the ESA, approved hatchery genetic management plans, or approved joint State-Tribe resource management plans for the hatchery programs described in the Fish Restoration Plan.

CAUSES OF ACTION

I. First Claim for Relief (NEPA): Failure to Prepare EIS or EA and FONSI for Fish Restoration Plan.

138. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

139. The Fish Restoration Plan and the activities described therein constitute a major federal action that significantly affects the quality of the environment. Preparation of an EIS is therefore required.

140. Defendants the United States Department of the Interior, Kenneth L. Salazar in his official capacity as the Secretary of the United States Department of the Interior, the National Park Service, Jonathan B. Jarvis in his official capacity as the Director of the National Park Service, the United States Fish and Wildlife Service, Daniel M. Ashe in his official capacity as the Director of the United States Fish and Wildlife Service, the United States Department of Commerce, John E. Bryson in his official capacity as the Secretary of the United States Department of Commerce, NOAA Fisheries Service, and Samuel D. Rauch III in his official capacity as the Assistant Administrator for Fisheries of NOAA Fisheries Service (collectively referred to herein as "Federal Defendants") are in violation of NEPA for preparing, authorizing,

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funding and/or implementing the Fish Restoration Plan and the activities described therein without preparing an EIS or an EA and a FONSI.

141. These actions of Federal Defendants in violation of NEPA are arbitrary, capricious, an abuse of discretion, and not in accordance with law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

II. Second Claim For Relief (NEPA): In the Alternative to First Claim for Relief, Failure to Prepare Supplemental EIS for Fish Restoration Plan.

142. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

143. In the alternative to the First Claim for Relief, if Federal Defendants prepared an EIS or other NEPA document related to their preparation, authorization, funding, and/or implementation of the Fish Restoration Plan and the activities described therein, Plaintiffs allege that Federal Defendants are in violation of NEPA for failing to supplement that EIS or other NEPA document.

144. Since preparation of that EIS or other NEPA document, there have been substantial changes in the proposed action that are relevant to environmental concerns and/or there are significant new circumstances and/or information relevant to environmental concerns that bear on the proposed action and/or its impacts. Supplementation is therefore required.

145. Developments requiring supplementation include, but are not limited to, development of the Fish Restoration Plan, advances in fishery and hatchery sciences, listing of Puget Sound steelhead as a threatened species under the ESA, and a reversal of the decision described in the 1996 Elwha River Ecosystem Restoration Implementation EIS that non-native Chambers Creek steelhead would not be used.

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146. Federal Defendants are in violation of NEPA for preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein without supplementing the EIS or other NEPA document related to such actions.

147. These actions of Federal Defendants in violation of NEPA are arbitrary, capricious, an abuse of discretion, and not in accordance with law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

III. Third Claim for Relief (NEPA): Failure to Conduct Alternatives Analysis.

148. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

149. The Fish Restoration Plan and the activities described therein involve unresolved conflicts concerning alternative uses of available resources.

150. Upon information and belief, Federal Defendants have not studied, developed, and/or described appropriate alternatives to the proposed activities described in the Fish Restoration Plan.

151. Federal Defendants are in violation of NEPA for preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein without studying, developing, and/or describing appropriate alternatives to such actions.

152. These actions of Federal Defendants in violation of NEPA are arbitrary, capricious, an abuse of discretion, and not in accordance with law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

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IV. Fourth Claim for Relief (ESA): Failure to Consult under Section 7 of the ESA on Effects of the Fish Restoration Plan.

153. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

154. The Fish Restoration Plan and the activities described therein may affect threatened Puget Sound Chinook salmon and its critical habitat, threatened Puget Sound steelhead, endangered Southern Resident Killer Whale, and threatened bull trout and its critical habitat. Consultation under section 7 of the ESA is therefore required.

155. Federal Defendants have not consulted under section 7 of the ESA regarding the effects of the Fish Restoration Plan and the activities described therein.

156. Federal Defendants are in violation of the ESA for preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein without consulting under section 7 of the ESA with NOAA Fisheries Service and the United States Fish and Wildlife Service regarding the effects of such actions on threatened Puget Sound Chinook salmon and its critical habitat, threatened Puget Sound steelhead, endangered Southern Resident Killer Whale, and threatened bull trout and its critical habitat.

157. These ESA violations of the Federal Defendants are reviewable under section 11(g) of the ESA.

V. Fifth Claim for Relief (ESA): In the Alternative to Fourth Claim for Relief, Failure to Reinitiate Consultation under Section 7 of the ESA on Effects of Fish Restoration Plan.

158. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

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159. In the alternative to the Fourth Claim for Relief, if Federal Defendants have consulted under section 7 of the ESA regarding the Fish Restoration Plan and the activities described therein, Plaintiffs allege that Federal Defendants are in violation of the ESA for failing to reinitiate consultation to evaluate the effects of such activities on threatened Puget Sound Chinook salmon and its critical habitat, threatened Puget Sound steelhead, endangered Southern Resident Killer Whale, and threatened bull trout and its critical habitat.

160. Since completion of any ESA section 7 consultation regarding the Fish Restoration Plan and the activities described therein, new information has revealed effects of the action that may affect listed species and/or critical habitat in a manner and/or to an extent not previously considered, the action has be modified in a manner that causes effects to the listed species and/or critical habitat that was not considered, and/or new species have been listed and/or critical habitat designated that may be affected by the action. Reinitiation of consultation is therefore required.

161. Events occurring since issuance of the United States Fish and Wildlife Service's 2000 biological opinion for threatened bull trout include, but are not limited to, development of the Fish Restoration Plan, advances in fishery and hatchery sciences, and a reversal of the decision described in the 1996 Elwha River Ecosystem Restoration Implementation EIS that non-native Chambers Creek steelhead would not be used.

162. Events occurring since issuance of the United States Fish and Wildlife Service's 2006 evaluation for threatened bull trout critical habitat, attached as Appendix 1 to NOAA Fisheries Service's 2006 biological opinion, include, but are not limited to, preparation of the Fish Restoration Plan and expansion of threatened bull trout critical habitat to include additional areas affected by the Fish Restoration Plan and the activities described therein.

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163. Events occurring since issuance of NOAA Fisheries Service's 2006 biological opinion for threatened Puget Sound Chinook salmon and its critical habitat, threatened Puget Sound steelhead, and Southern Resident Killer Whale include, but are not limited to, development of the Fish Restoration Plan, advances in fishery and hatchery sciences, a reversal of the decision described in the 1996 Elwha River Ecosystem Restoration Implementation EIS that non-native Chambers Creek steelhead would not be used, and the listing of Puget Sound steelhead as a threatened species under the ESA.

164. Federal Defendants are in violation of the ESA for preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein without reinitiating consultation under section 7 of the ESA with NOAA Fisheries Service and the United States Fish and Wildlife Service regarding the effects of such actions on threatened Puget Sound Chinook salmon and its critical habitat, threatened Puget Sound steelhead, endangered Southern Resident Killer Whale, and threatened bull trout and its critical habitat.

165. These violations of the Federal Defendants are reviewable under section 11(g) of the ESA.

VI. Sixth Claim for Relief (ESA): In the Alternative to Fourth Claim for Relief, NOAA Fisheries Service's 2006 Biological Opinion is Arbitrary and Capricious.

166. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

167. In the alternative to the Fourth Claim for Relief, if NOAA Fisheries Service's 2006 biological opinion constitutes consultation under section 7 of the ESA for the Fish Restoration Plan and the activities described therein, Plaintiffs allege that NOAA Fisheries

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Service's 2006 biological opinion is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

168. NOAA Fisheries Service's 2006 biological opinion does not use the best scientific and commercial data available in evaluating the Fish Restoration Plan and the activities described therein. The biological opinion does not include a determination as to whether the Fish Restoration Plan—either individually or in conjunction with the dam removal activities—reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of listed species in the wild by reducing the reproduction, numbers, or distribution of the species. To the extent the biological opinion does include such a determination, the biological opinion does not include a summary of the information on which that opinion is based or a detailed discussion of the effects of the Fish Restoration Plan on listed species and their critical habitat. Any determination in the biological opinion that the activities described in the Fish Restoration Plan—individually or in conjunction with the dam removal activities—are not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of their critical habitat is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

169. NOAA Fisheries Service's 2006 biological opinion does not include an incidental take statement specifying the impact to listed species (*i.e.*, the amount of take) anticipated or authorized as a result of implementing the Fish Restoration Plan, specifying reasonable and prudent measures necessary or appropriate to minimize such impact, or specifying terms and conditions that must be complied with related to the Fish Restoration Plan. There are no requirements to monitor the take associated with the Fish Restoration Plan or requiring the reinitiation of consultation if such take is exceeded.

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170. NOAA Fisheries Service's 2006 biological opinion does not include an incidental take statement specifying the impact to threatened Puget Sound steelhead (*i.e.*, the amount of take) anticipated or authorized as a result of removing the Elwha and Glines Canyon dams and the associated dam removal activities, specifying reasonable and prudent measures necessary or appropriate to minimize such impact, or specifying terms and conditions that must be complied with. There are no requirements to monitor the take of Puget Sound steelhead associated with these dam removal activities or requiring the reinitiation of consultation if such take is exceeded.

171. NOAA Fisheries Service's 2006 biological opinion, and the incidental take statement included therein, is arbitrary, capricious, an abuse of discretion, and not in accordance with law, and is reviewable under the APA, 5 U.S.C. §§ 701-706.

VII. Seventh Claim for Relief (ESA): Failure to Insure No Jeopardy.

172. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

173. The Fish Restoration Plan and the activities described therein are likely to jeopardize the continued existence of threatened Puget Sound Chinook salmon, threatened Puget Sound steelhead, threatened bull trout, and endangered Southern Resident Killer Whale, and are likely to adversely modify critical habitat designated for Puget Sound Chinook salmon and bull trout.

174. Federal Defendants are in violation of section 7 of the ESA for preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein without insuring that such jeopardy and/or adverse modification is not likely to result.

175. These violations of the ESA by Federal Defendants are reviewable under section 11(g) of the ESA.

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VIII. Eighth Claim for Relief (ESA): Unauthorized Take of Protected Species by Federal Defendants.

176. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

177. The Fish Restoration Plan and the activities described therein cause "take" of threatened Puget Sound Chinook salmon, threatened Puget Sound steelhead, and threatened bull trout. Such "take" is not authorized by an incidental take statement, permit, exception, exemption, or otherwise.

178. Federal Defendants are in violation of section 9 of the ESA for causing take of threatened Puget Sound Chinook salmon, threatened Puget Sound steelhead, and threatened bull trout through the preparation, authorization, funding, and/or implementation of the Fish Restoration Plan and the activities described therein. These actions causing take, and the ESA violations related thereto, are ongoing.

179. Removal of the Elwha Dam and the Glines Canyon Dam and related activities cause "take" of threatened Puget Sound steelhead through, *inter alia*, increase sediment loads in the Elwha River. Such "take" is not authorized by an incidental take statement, permit, exception, exemption, or otherwise.

180. Federal Defendants are in violation of section 9 of the ESA for causing take of threatened Puget Sound steelhead through their authorization, funding, and/or implementation of the removal of the Elwha Dam and the Glines Canyon Dam and related activities. These actions causing take, and the ESA violations related thereto, are ongoing.

181. These violations of the ESA by the Federal Defendants are reviewable under section 11(g) of the ESA.

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IX. Ninth Claim for Relief (ESA): Unauthorized Take of Protected Species by Tribe Officials.

182. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

183. Defendant Robert Elofson in his official capacity as the Director of the River Restoration Project for the Lower Elwha Klallam Tribe, Defendant Larry Ward in his official capacity as the Hatchery Manager and Fisheries Biologist for the Lower Elwha Klallam Tribe, Defendant Doug Morrill in his official capacity as the Fisheries Manager for the Lower Elwha Klallam Tribe, and Defendant Mike McHenry in his official capacity as the Fisheries Habitat Biologist and Manager for the Lower Elwha Klallam Tribe (collectively referred to herein as "Tribe Officials") are in violation of section 9 of the ESA for causing take of threatened Puget Sound Chinook salmon, threatened Puget Sound steelhead, and threatened bull trout through the preparation, authorization, funding, and/or implementation of the Fish Restoration Plan and the activities described therein. These actions causing take, and the ESA violations related thereto, are ongoing.

184. These violations of the ESA by the Tribe Officials are reviewable under section 11(g) of the ESA.

X. Tenth Claim for Relief (Elwha Act): Failure to Provide for the Full Restoration of Native Anadromous Fisheries.

185. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

186. The Fish Restoration Plan and the activities described therein violate the mandate of the Elwha Act that the Elwha River ecosystem and native anadromous fisheries be fully

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restored. The hatchery artificial production programs described in the Fish Restoration Plan will prevent the full restoration of native wild fish.

187. Federal Defendants are in violation of the Elwha Act for preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein.

188. These violations of the Elwha Act by Federal Defendants are reviewable under the APA, 5 U.S.C. §§ 701-706.

XI. Eleventh Claim for Relief (Wilderness Act): Prohibited Activities Occurring within the Olympic Wilderness.

189. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

190. The Fish Restoration Plan and the activities described therein include commercial enterprises conducted within the Olympic Wilderness in violation of the Wilderness Act, including the planting of fish intended to benefit commercial-level harvests. Such commercial activities, and the extent of such activities, are not necessary activities which are proper for realizing the recreational or other wilderness purposes of the area. Further, Federal Defendants have not conducted the analysis required by the Wilderness Act and its implementing rules and polices to evaluate whether these commercial activities should be permitted.

191. The Fish Restoration Plan includes helicopter flights and landings within the Olympic Wilderness in violation of the Wilderness Act. Such flights are not necessary to meet the minimum requirements for the administration of the area for the purposes of the Wilderness Act. Further, Federal Defendants have not conducted the analysis required by the Wilderness Act and its implementing rules and polices to evaluate whether these helicopter flights and landings should be permitted.

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192. Federal Defendants are in violation of the Wilderness Act for preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein.

193. These violations of the Wilderness Act by Federal Defendants are reviewable under the APA, 5 U.S.C. §§ 701-706.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

A. Issue a declaratory judgment declaring that Federal Defendants are in violation of NEPA and the APA for preparing, authorizing, funding and/or implementing the Fish Restoration Plan and the activities described therein without preparing an EIS or an EA and a FONSI, and/or for not preparing a supplemental EIS or other NEPA document;

B. Issue a declaratory judgment declaring that Federal Defendants are in violation of NEPA and the APA for preparing, authorizing, funding and/or implementing the Fish Restoration Plan and the activities described therein without studying, developing, and/or describing appropriate alternatives to the activities described in the Fish Restoration Plan;

C. Issue a declaratory judgment declaring that Federal Defendants are in violation of the ESA for preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein without consulting under section 7 of the ESA regarding the effects of such actions on threatened Puget Sound Chinook salmon and its critical habitat, threatened Puget Sound steelhead, endangered Southern Resident Killer Whale, and threatened bull trout and its critical habitat, and/or for failing to reinitiate any such consultation;

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D. Issue a declaratory judgment declaring that NOAA Fisheries Service's 2006 biological opinion, and the incidental take statement included therein, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

E. Issue a declaratory judgment declaring that Federal Defendants are in violation of section 7 of the ESA for preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein without insuring that such actions are not likely to jeopardize the continued existence of threatened Puget Sound Chinook salmon, threatened Puget Sound steelhead, threatened bull trout, and endangered Southern Resident Killer Whale, and are not likely to adversely modify critical habitat designated for Puget Sound Chinook salmon and bull trout;

F. Issue a declaratory judgment declaring that Federal Defendants and the Tribe Officials are in violation of section 9 of the ESA for causing "take" of threatened Puget Sound Chinook salmon, threatened Puget Sound steelhead, and threatened bull trout through the preparation, authorization, funding, and/or implementation of the Fish Restoration Plan and the activities described therein;

G. Issue a declaratory judgment declaring that Federal Defendants are in violation of section 9 of the ESA for causing "take" of threatened Puget Sound steelhead through the authorization, funding, and/or implementation of the Elwha Dam and Glines Canyon Dam removal and related activities;

H. Issue a declaratory judgment declaring that Federal Defendants are in violation of the Elwha Act and APA by preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein;

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I. Issue a declaratory judgment declaring that Federal Defendants are in violation of the Wilderness Act and APA by preparing, authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein;

J. Issue a mandatory injunction requiring Federal Defendants to comply with NEPA, the ESA, the Elwha Act, the Wilderness Act and the APA;

K. Issue a mandatory injunction setting aside NOAA Fisheries Service's 2006 biological opinion and the incidental take statement included therein;

L. Issue a mandatory injunction requiring the Tribe Officials to comply with the ESA;

M. Enjoin Federal Defendants and the Tribe Officials from authorizing, funding, and/or implementing the Fish Restoration Plan and the activities described therein until compliance with NEPA, the ESA, the Elwha Act, the Wilderness Act, and the APA is achieved;

N. Grant such preliminary and/or permanent injunctive relief as Plaintiffs may from time to time request during the pendency and resolution of this case;

O. Award Plaintiffs their reasonable litigation expenses, including attorney fees, expert witness fees, Court costs, and other expenses as necessary for the preparation and litigation of this case under section 11(g)(4) of the ESA, the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and/or as otherwise authorized by law; and

P. Grant such additional relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 9th day of February, 2012.

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EXHIBIT 1

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September 16, 2011

Certified U.S. Mail – Return Receipt Requested
United States Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Certified U.S. Mail – Return Receipt Requested
Kenneth L. Salazar, Secretary
United States Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Certified U.S. Mail – Return Receipt Requested
National Park Service
1849 C Street N.W.
Washington, D.C. 20240

Certified U.S. Mail – Return Receipt Requested
Jonathan B. Jarvis, Director
National Park Service
1849 C Street N.W.
Washington, D.C. 20240

Certified U.S. Mail – Return Receipt Requested
United States Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

Certified U.S. Mail – Return Receipt Requested
Daniel M. Ashe, Director
United States Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

Certified U.S. Mail – Return Receipt Requested
United States Department of Commerce
1401 Constitution Ave. N.W.
Washington, D.C. 20230

Certified U.S. Mail – Return Receipt Requested
Rebecca M. Blank, Acting Secretary
United States Department of Commerce
1401 Constitution Ave. N.W.
Washington, D.C. 20230

Certified U.S. Mail – Return Receipt Requested
NOAA Fisheries Service
1315 East West Highway
Silver Spring, MD 20910

Certified U.S. Mail – Return Receipt Requested
Eric C. Schwaab, Assistant Administrator for Fisheries
NOAA Fisheries Service
1315 East West Highway
Silver Spring, MD 20910

Certified U.S. Mail – Return Receipt Requested
Phil Anderson, Director
Washington Department of Fish and Wildlife
600 Capitol Way N.
Olympia, WA 98501

RE: Notice of Intent to Sue for Violations of Sections 7 and 9 of the Endangered Species Act Regarding the Elwha River Fish Restoration Plan and Other Activities

Dear Honorable Civil Servants:

You are hereby informed that, unless the violations described herein are remedied within sixty days, the organizations listed below intend to sue the National Park Service and its Director Jonathan B. Jarvis (collectively, "NPS"), the United States Department of the Interior and its Secretary Kenneth L. Salazar (collectively, "DOI"), the United States Fish and Wildlife Service and its Director Daniel M. Ashe (collectively, "USFWS"), the United States Department of Commerce and its Acting Secretary Rebecca M. Blank (collectively, "DOC"), NOAA Fisheries Service and its Assistant Administrator for Fisheries Eric C. Schwaab (collectively, "NOAA Fisheries"), and the Director of the Washington Department of Fish and Wildlife Phil Anderson ("WDFW") for violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et al.*, associated with approving, funding, and/or implementing the Elwha River Fish Restoration Plan and associated hatchery operations. This letter is provided pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g), on behalf of the Wild Fish Conservancy, the Wild Steelhead Coalition, the Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a the Conservation Angler. Contact information for these organizations is provided below:

Wild Fish Conservancy
15629 Main Street NE, Duvall, WA 98019
Tel: (425) 788-1167

The Wild Steelhead Coalition
218 Main Street, Box No. 264, Kirkland, WA 98033
Tel: (425) 941-7041

The Federation of Fly Fishers Steelhead Committee
5237 US Hwy 89 South, Suite 11, Livingston, MT 59047
Tel: (406) 222-9369

Wild Salmon Rivers d/b/a the Conservation Angler
16430 72nd Ave. W., Edmonds, WA 98026
Tel: (425) 742-4651

I. Legal Framework.

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and implementing regulations, require that federal agencies insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat designated for such species. An action is considered to result in such jeopardy where it would reasonably be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02.

Federal agencies are required to consult with NOAA Fisheries and/or USFWS for any action that "may affect" protected species or critical habitat to assess whether the action will jeopardize the species or adversely modify the habitat. 50 C.F.R. § 402.14(a). Until the consulting agency issues a comprehensive biological opinion, the action agency may not commence the action. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *and see* 16 U.S.C. § 1536(d). In fulfilling section 7 consultation duties, agencies are required to use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); *Heartwood, Inc. v. United States Forest Serv.*, 380 F.3d 428, 434 (8th Cir. 2004).

Federal agencies have a continuing duty under section 7 of the ESA to insure that their actions will not jeopardize the continued existence of listed species or adversely modify designated critical habitat. An agency must re-initiate consultation whenever "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," where the action in question is "subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion," or where "a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16(b)-(d).

Federal agencies have an independent and substantive obligation to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or adversely modify critical habitat. *See Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). Indeed, a "no jeopardy" biological opinion from NOAA Fisheries or USFWS does not absolve the action agency of its duty to insure that its actions comply with the ESA. *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

Section 9(a) of the ESA, 16 U.S.C. § 1538(a), prohibits the "take" of an endangered species by any person. This prohibition has generally been applied to species listed as "threatened" through the issuance of regulations under section 4(d) of the ESA, 16 U.S.C. § 1533(d). "Take" includes actions that kill, harass or harm a protected species. 16 U.S.C. § 1532(19). "Harass" is defined to include acts that create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns. 50 C.F.R. § 17.3. "Harm" includes significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavioral patterns. *Id.*; 50 C.F.R. § 222.102.

II. Factual Background.

A. Affected Species and Critical Habitat.

The Puget Sound Chinook salmon (evolutionary significant unit) is listed as a threatened species under the ESA. 64 Fed. Reg. 14,308 (March 24, 1999); 70 Fed. Reg. 37,160 (June 28, 2005). Critical habitat has been designated for this species. 70 Fed. Reg. 52,630 (Sept. 2, 2005). The Puget Sound steelhead (distinct population segment) is listed as threatened under the ESA. 72 Fed. Reg. 26,722 (May 11, 2007). The Southern Resident Killer Whale (distinct population segment) is listed as an endangered species under the ESA. 70 Fed. Reg. 69, 903 (Nov. 18, 2005). The coterminous United States population of bull trout is listed as a threatened species under the ESA. 64 Fed. Reg. 58,910 (Nov. 1, 1999). Critical habitat has been designated for threatened bull trout. 75 Fed. Reg. 63,898 (Oct. 18, 2010).

B. Development of the Elwha River Fish Restoration Plan.

Pursuant to Congressional directive in the Elwha River Ecosystem and Fisheries Restoration Act of 1992, the DOI determined in 1994 that removal of the Elwha and Glines Canyon dams in the Olympic National Park is necessary to fully restore the Elwha River ecosystem and fisheries. Since then, NPS, NOAA Fisheries, USFWS, and WDFW, along with other stakeholders, have worked to create a fish restoration plan to coincide with the removal of the Elwha and Glines Canyon Dams that will restore various fish populations in the Elwha River.

The fish restoration plan has apparently been developed and evolved through a variety of agency documents. NPS released a final environmental impact statement

("EIS") in 1996 that analyzed the environmental impacts of the Elwha and Glines Canyon Dams removal process and included an early version of the "Elwha River Fish Restoration Plan" that discussed various options for restoring fish species.

The final Elwha River Fish Restoration Plan was published as a NOAA Technical Memorandum dated April 2008 ("2008 Fish Restoration Plan"). The authors of the Fish Restoration Plan include representatives of NPS, NOAA Fisheries, USFWS, and WDFW. The 2008 Fish Restoration Plan purports to describe the finalized plans for fish restoration before, during, and after the dam removal process. The 2008 Fish Restoration Plan includes modifications from earlier iterations of the plan expected to impact threatened and endangered species and their critical habitat.

The 2008 Fish Restoration Plan describes a significant role for hatcheries and hatchery fish to supplement or "restore" fish runs during and after the dam removal process without a clearly articulated adaptive management strategy to monitor and phase out such hatchery practices. The 2008 Fish Restoration Plan's discussion of hatchery activities includes significant artificial supplementation of fish stocks, outplantings of hatchery fish, and broodstocks. One example of the 2008 Fish Restoration Plan's hatchery operations is a maintenance program for the continued planting of non-indigenous Chambers Creek hatchery winter steelhead.

Various scientific studies, technical memoranda, and agency documents highlight the serious ecological risks that hatchery fish pose to native salmonids. Artificial supplementation of native Chinook and steelhead can lower reproductive fitness, increase competition for resources, cause interbreeding between native and non-native species, and expose native fish to diseases. Native salmonids will be even more vulnerable to the risks posed by hatchery practices due to the degraded environmental conditions caused by the dam removal process, such as large sediment loads. In 2010 correspondence with the Lower Elwha Klallam Tribe concerning the Chambers Creek steelhead hatchery plans, scientists at NOAA Fisheries, NPS, and WDFW recognized the serious risks that hatchery fish pose to the survival and restoration of native salmonids. Despite the agencies' serious concerns about the use of hatchery fish in conjunction with the dam removal process and the Elwha River Fish Restoration Project, the 2008 Fish Restoration Plan formally approves these plans.

C. ESA Consultation History.

USFWS issued its Final Biological Opinion for the Elwha River Restoration Project on February 24, 2000. This biological opinion focused on the effects of dam removal on threatened bull trout. The biological opinion included an incidental take statement for bull trout harmed by dam removal, the construction of related flood control, road improvement and water supply measures, and the interim operation of hydroelectric projects. USFWS issued a joint biological opinion with NOAA Fisheries evaluating the effects of the project on bull trout critical habitat dated November 20, 2006. USFWS issued a memorandum dated January 21, 2010 re-initiating ESA consultation to address specific issues not relevant to the effects of the 2008 Fish Restoration Plan on bull trout.

The biological opinions and consultation documents prepared by USFWS do not fully address the adverse effects to bull trout and its critical habitat caused by the activities described in the 2008 Fish Restoration Plan, in particular the effects from hatchery practices. An incidental take statement been not been issued related to the harm caused to bull trout from the activities described in the 2008 Fish Restoration Plan.

NOAA Fisheries issued a biological opinion that assessed the effects of the Elwha River Ecosystem and Fisheries Restoration Project dated November 20, 2006. This document evaluated the effects of the project on threatened Puget Sound Chinook salmon and its designated critical habitat, Puget Sound steelhead (then proposed for listing as a threatened species), and endangered Southern Resident Killer Whale. This document focused on effects resulting from dam removal, while providing a limited discussion of the planned hatchery operations. An incidental take statement was included addressing harm to Puget Sound Chinook salmon associated with increased sediment loads.

The 2006 biological opinion prepared by NOAA Fisheries does not fully address the adverse effects to Puget Sound Chinook salmon and its critical habitat, Puget Sound steelhead, or Southern Resident Killer Whale resulting from the activities described in the 2008 Fish Restoration Plan, in particular those effects from hatchery practices. This biological opinion does not include an incidental take statement for harm caused to Puget Sound Chinook salmon from the activities described in the 2008 Fish Restoration Plan. This biological opinion does not include an incidental take statement for harm caused to Puget Sound steelhead from the 2008 Fish Restoration Plan or from the dam removal process and associated activities.

III. ESA Section 7 Violations.

NPS, NOAA Fisheries, USFWS, DOI, and DOC are required to comply with the procedural and substantive requirements of section 7 of the ESA, 16 U.S.C. § 1536, in carrying out, funding, and/or authorizing the activities described in the 2008 Fish Restoration Plan to insure that these activities will not jeopardize the continued existence of protected species, including Puget Sound Chinook salmon, Puget Sound steelhead, bull trout, and Southern Resident Killer Whale, or result in the adverse modification of designated critical habitat, including such habitat for Puget Sound Chinook salmon and bull trout. These federal agencies have failed to comply with these statutory requirements.

A. Failure to Consult Under Section 7(a)(2) of the ESA.

NPS, NOAA Fisheries, USFWS, DOI, and DOC are required to consult under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), in authorizing, carrying out, and/or funding the activities described in the 2008 Fish Restoration Plan. The agencies are required to consult regarding the effects of these activities on each protected species that may be affected, which includes Puget Sound Chinook salmon, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout. The agencies are further required to

consult regarding the effects of these activities on any designated critical habitat that may be affected, which includes critical habitat designated for Puget Sound Chinook salmon and bull trout.

NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), for authorizing, carrying out, and/or funding the activities described in the 2008 Fish Restoration Plan without consulting on their effects to Puget Sound Chinook salmon, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout. NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), for authorizing, carrying out, and/or funding the activities described in the 2008 Fish Restoration Plan without consulting on their effects to critical habitat designated for Puget Sound Chinook salmon and bull trout.

B. Failure to Re-initiate Consultation Under Section 7 of the ESA.

To the extent that the biological opinions discussed *supra* in section II.C constituted consultation under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), for the activities described in the 2008 Fish Restoration Plan, NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of the ESA for failure to re-initiate consultation regarding the effects of these activities on Puget Sound Chinook salmon and its critical habitat, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout and its critical habitat. These agencies are further in violation of the ESA for failing to re-initiate consultation regarding the effects of the Elwha and Glines Canyon Dam removal and related activities on threatened steelhead and bull trout critical habitat.

The February 24, 2000 biological opinion prepared by USFWS and the November 20, 2006 biological opinion prepared by NOAA Fisheries were issued before completion of the 2008 Fish Restoration Plan. The 2008 Fish Restoration Plan describes expansive hatchery and other fish supplementation activities not evaluated in these or other ESA consultation documents. For example, NOAA Fisheries' 2006 biological opinion did not discuss or assess the effects of the Chambers Creek hatchery operations on the native salmonids. Yet the 2008 Fish Restoration Plan discusses how the Chambers Creek hatchery operations will continue throughout the dam removal process, despite the vulnerable state of the native salmonids and the adverse effects from this hatchery practice. Modifications to the hatchery operations described in the 2008 Fish Restoration Plan such as the Chambers Creek maintenance triggered the re-initiation of consultation.

Significant new information about the listed species and the effects of hatchery practices on native salmonids has arisen since the February 24, 2000 biological opinion prepared by USFWS and the November 20, 2006 biological opinion prepared by NOAA Fisheries were issued. NPS and NOAA Fisheries have recognized the large body of scientific research that discusses the serious risks that hatchery fish pose to native salmonids. For example, on March 23, 2010, the Chief Fisheries Biologists at Olympic National Park sent a letter to the Lower Elwha Klallam Tribe detailing the risks that the Chambers Creek hatchery steelhead pose to native steelhead and other wild salmonids in

the Elwha River. NPS biologists explained that these hatchery fish posed "many genetic and ecological risk factors to wild steelhead and other native fish," including genetic mixing, competition, predation, and pathogen amplification and transmission. NOAA Fisheries discussed similar scientific information and problems with the Chambers Creek hatchery fish in a white paper on the same subject.

These documents demonstrate that a significant body of scientific literature has established the harmful effects of hatchery practices in general, and from the Chambers Creek stock in particular, on the survival and recovery of native salmonids in the Elwha River. This information was not evaluated when NOAA Fisheries prepared its 2006 biological opinion or when USFWS prepared its 2000 biological opinion.

Puget Sound steelhead was listed as a threatened species in 2007, after NOAA Fisheries completed its November 20, 2006 biological opinion. The agencies have not re-initiated consultation with NOAA Fisheries to evaluate the effects of the 2008 Fish Restoration Plan or the removal of the Elwha and Glines Canyon Dams and related activities on Puget Sound steelhead.

Critical habitat designated for bull trout was expanded in 2010 beyond that evaluated in USFWS and NOAA Fisheries' joint biological opinion issued in 2006. The additional designated critical habitat includes habitat within the area affected by the activities described in the 2008 Fish Restoration Plan and by the removal of the Elwha and Glines Canyon Dams and related activities. The agencies have not re-initiated consultation with USFWS to evaluate the effects of these activities on the expanded bull trout critical habitat.

NPS, NOAA Fisheries, USFWS, DOI, and DOC are required to re-initiate consultation regarding the activities described in the 2008 Fish Restoration Plan because modifications to the activities cause effects not previously considered, new information reveals effects to protected species and critical habitat not previously considered, and because a new species has been listed as threatened and additional critical habitat has been designated. The agencies are required to re-initiate consultation regarding the effects of Elwha and Glines Canyon Dams removal and related activities on threatened steelhead because this species was listed as threatened after NOAA Fisheries issued its 2006 biological opinion. The agencies are required to re-initiate consultation regarding the effects of Elwha and Glines Canyon Dams removal and related activities on bull trout critical habitat because this habitat was expanded after USFWS and NOAA Fisheries issued their joint 2006 biological opinion. NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of the ESA for failing to re-initiate consultation.

C. Failure to Insure the 2008 Fish Restoration Plan will not Cause Jeopardy.

In addition to the procedural consultation requirements of section 7 of the ESA, NPS, NOAA Fisheries, USFWS, DOI, and DOC are required to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification

of designated critical habitat. 16 U.S.C. § 1536(a)(2). NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of this requirement by authorizing, funding, and/or carrying out the activities described in the 2008 Fish Restoration Plan.

The 2008 Fish Restoration Plan describes significant hatchery operations to be implemented in the Elwha River system. Broodstock collections, outplantings, and artificial supplementation will introduce large quantities of non-native and/or hatchery fish that pose significant ecological risks to native salmonids. The 2008 Fish Restoration Plan does not include a clearly articulated adaptive management strategy to monitor and phase out these hatchery practices. The activities described in the 2008 Fish Restoration Plan are likely to jeopardize the continued existence of Puget Sound Chinook salmon, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout. These activities are further likely to adversely modify critical habitat designated for Puget Sound Chinook salmon and bull trout.

NPS, NOAA Fisheries, and WDFW have recognized the serious risks that these hatchery operations, in particular those related to the Chambers Creek steelhead stocks, will have on the survival of the native salmonids. For example, in a NOAA Fisheries white paper for the Lower Elwha Klallam Tribe, agency scientists concluded that "Chambers Creek hatchery steelhead pose a significant risk to the wild steelhead and rainbow trout in the Elwha" and that "there is a high level of potential for interactions between Chambers Creek hatchery steelhead and wild steelhead, resident rainbow trout, and other salmonid species." *See* J. McMillan, et. al. *A review of risks for non-native hatchery salmonids with application to the Chambers Creek hatchery steelhead in the Elwha River Project*, p. 45. Although the NOAA Fisheries white paper highlights the harm that will occur to native salmonids from the Chambers Creek steelhead stocks, the paper reviewed scientific literature that supports general conclusions regarding the harm hatchery fish pose to native salmonids. The paper also discusses how the Chambers Creek steelhead stock poses serious risks to the recovery of native salmonids.

The activities described in the 2008 Fish Restoration Plan are likely to jeopardize the continued existence of Puget Sound Chinook salmon, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout. The activities described in the 2008 Fish Restoration Plan are likely to adversely modify critical habitat designated for Puget Sound Chinook salmon and bull trout. NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of section 7 of the ESA by authorizing, funding, and/or carrying out these activities.

IV. ESA Section 9 Violations.

NPS, NOAA Fisheries, USFWS, DOI, DOC and WDFW are in violation of section 9 of the ESA for causing take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout through the activities described in the 2008 Fish Restoration Plan. NPS, NOAA Fisheries, USFWS, DOI, and DOC are further in violation of section 9 of the ESA for causing take of Puget Sound steelhead through the removal of the Elwha and Glines Canyon Dams and associated activities.

The hatchery operations described in the 2008 Fish Restoration Plan will result in take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout in a variety of ways. For example, supplementation of fish can cause take in the event that the returning adults have reproductive fitness that is lower than the original natural-origin (wild) adults. Studies on both spring Chinook and winter and summer-run steelhead show that there is a non-negligible risk of reduced fitness for returning adults. Indeed, recent studies involving winter-run and summer-run steelhead have shown that the reproductive success of naturally spawning progeny of supplementation hatchery fish whose parents were wild is significantly lower than wild fish.

Additionally, the 2008 Fish Restoration Plan includes proposals to transplant adult and/or juvenile hatchery offspring to the upper Elwha basin for release while also releasing hatchery juveniles into the lower river. Releasing hatchery juveniles into the lower river will create severe competition for food and rearing space for the migrants from the upper basin, resulting in take of ESA protected fish. Because the hatchery fish are and will continue to increase competition, reduce fitness, and disrupt the feeding and breeding of the native salmonids, the hatchery operations will cause take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout.

The removal of the Elwha and Glines Canyon Dams and associated activities will result in take of Puget Sound steelhead through increased sediment load and other environmental and ecological impacts.

Despite the harm that will result to ESA protected species from the activities described in the 2008 Fish Restoration Plan, the agencies have not received incidental take statements or other authorizations that shield them from liability under section 9 of the ESA. Further, the agencies have not received an incidental take statement for harm caused to Puget Sound steelhead from the removal of the Elwha and Glines Canyon Dams and associated activities.

The activities described in the 2008 Fish Restoration Plan cause take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout. NPS, NOAA Fisheries, USFWS, DOI, DOC and WDFW are in violation of section 9 of the ESA for causing such take. The removal of the Elwha and Glines Canyon Dams and associated activities cause take of Puget Sound steelhead. NPS, NOAA Fisheries, USFWS, DOI, DOC are in violation of section 9 of the ESA for causing such take.

V. Conclusion.

Under section 11(g) of the ESA, 16 U.S.C. § 1540(g), this letter provides NPS, NOAA Fisheries, USFWS, DOI, DOC, and WDFW with sixty days notice of Wild Fish Conservancy, the Wild Steelhead Coalition, the Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a the Conservation Angler's intent to sue for violations of the ESA discussed herein. Unless the ongoing and/or imminent violations described above are corrected within sixty days, these organizations intend to file suit

against the responsible agencies and officials to enforce the ESA. During the notice period, we will be available to discuss effective remedies and actions that will assure future compliance with the ESA.

Very truly yours,

SMITH & LOWNEY, PLLC

By: _____
Brian A. Knutsen

EXHIBIT 2

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883, FAX (206) 860-4187

November 16, 2011

Certified U.S. Mail – Return Receipt Requested
Robert Elofson, Director of the River Restoration Project
Lower Elwha Klallam Tribe
Tribal Center
2851 Lower Elwha Road
Port Angeles, WA 98363

Certified U.S. Mail – Return Receipt Requested
Larry Ward, Hatchery Manager and Fisheries Biologist
Lower Elwha Klallam Tribe
Fish Hatchery
51 Hatchery Road
Port Angeles, WA 98363

Certified U.S. Mail – Return Receipt Requested
Doug Morrill, Fisheries Manager
Lower Elwha Klallam Tribe
51 Hatchery Road
Port Angeles, WA 98363

Certified U.S. Mail – Return Receipt Requested
Mike McHenry, Fisheries Habitat Biologist and Manager
Lower Elwha Klallam Tribe
51 Hatchery Road
Port Angeles, WA 98363

Certified U.S. Mail – Return Receipt Requested
Kenneth L. Salazar, Secretary
United States Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Certified U.S. Mail – Return Receipt Requested
Daniel M. Ashe, Director
United States Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

Certified U.S. Mail – Return Receipt Requested
Rebecca M. Blank, Acting Secretary
United States Department of Commerce
1401 Constitution Ave. N.W.
Washington, D.C. 20230

Certified U.S. Mail – Return Receipt Requested
Eric C. Schwaab, Assistant Administrator for Fisheries
NOAA Fisheries Service
1315 East West Highway
Silver Spring, MD 20910

RE: Notice of Intent to Sue for Violations of Section 9 of the Endangered Species Act Regarding the Elwha River Fish Restoration Plan

Dear Mr. Elofson, Mr. Ward, Mr. Morrill, Mike McHenry, and honorable civil servants:

This letter provides notice of the intent to sue Robert Elofson in his official capacity as the Director of the River Restoration Project for the Lower Elwha Klallam Tribe, Larry Ward in his official capacity as the Hatchery Manager and Fisheries Biologist for the Lower Elwha Klallam Tribe, Doug Morrill in his official capacity as the Fisheries Manager for the Lower Elwha Klallam Tribe, and Mike McHenry in his official capacity as the Fisheries Habitat Biologist and Manager for the Lower Elwha Klallam Tribe (collectively referred to herein as the "Hatchery Operators") for violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et al*., associated with approving, funding, and implementing the Elwha River Fish Restoration Plan and associated hatchery operations. The organizations listed below intend to sue if the violations described herein are not remedied within sixty days. This letter is provided pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g), on behalf of the Wild Fish Conservancy, the Wild Steelhead Coalition, the Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a the Conservation Angler. Contact information for these organizations is provided below:

Wild Fish Conservancy
15629 Main Street NE, Duvall, WA 98019
Tel: (425) 788-1167

The Wild Steelhead Coalition
218 Main Street, Box No. 264, Kirkland, WA 98033
Tel: (425) 941-7041

The Federation of Fly Fishers Steelhead Committee
5237 US Hwy 89 South, Suite 11, Livingston, MT 59047
Tel: (406) 222-9369

Wild Salmon Rivers d/b/a the Conservation Angler
16430 72nd Ave. W., Edmonds, WA 98026
Tel: (425) 742-4651

I. Legal Framework.

Section 9(a) of the ESA, 16 U.S.C. § 1538(a), prohibits the "take" of an endangered species by any person. This prohibition has generally been applied to species listed as "threatened" through the issuance of regulations under section 4(d) of the ESA, 16 U.S.C. § 1533(d). "Take" includes actions that kill, harass or harm a protected species. 16 U.S.C. § 1532(19). "Harass" is defined to include acts that create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include breeding, feeding, or sheltering. 50 C.F.R. § 17.3. "Harm" includes significant habitat modification or degradation that kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. *Id.*; *and* 50 C.F.R. § 222.102.

II. Factual Background.

A. Affected Species and Critical Habitat.

The Puget Sound Chinook salmon (evolutionary significant unit) is listed as a threatened species under the ESA. 64 Fed. Reg. 14,308 (March 24, 1999); 70 Fed. Reg. 37,160 (June 28, 2005). Critical habitat has been designated for this species. 70 Fed. Reg. 52,630 (Sept. 2, 2005). The Puget Sound steelhead (distinct population segment) is listed as threatened under the ESA. 72 Fed. Reg. 26,722 (May 11, 2007). The Southern Resident Killer Whale (distinct population segment) is listed as an endangered species under the ESA. 70 Fed. Reg. 69, 903 (Nov. 18, 2005). The coterminous United States population of bull trout is listed as a threatened species under the ESA. 64 Fed. Reg. 58,910 (Nov. 1, 1999). Critical habitat has been designated for threatened bull trout. 75 Fed. Reg. 63,898 (Oct. 18, 2010).

B. Development of the Elwha River Fish Restoration Plan.

Pursuant to Congressional directive in the Elwha River Ecosystem and Fisheries Restoration Act of 1992, the United States Department of Interior ("DOI") determined in 1994 that removal of the Elwha and Glines Canyon dams in the Olympic National Park is necessary to fully restore the Elwha River ecosystem and fisheries. Since then, the National Park Service ("NPS"), NOAA Fisheries, the United States Fish and Wildlife Service ("USFWS"), the Washington Department of Fish and Wildlife ("WDFW"), and officials from the Lower Elwha Klallam Tribe, including the Hatchery Operators, along with other stakeholders, have worked to create a fish restoration plan to coincide with the removal of the Elwha and Glines Canyon Dams that will restore various fish populations in the Elwha River.

The fish restoration plan has apparently been developed and evolved through a series of agency documents. NPS released a final environmental impact statement in 1996 that analyzed the environmental impacts of the Elwha and Glines Canyon Dams removal process and included an early version of the "Elwha River Fish Restoration Plan" that discussed various options for restoring fish species.

The final Elwha River Fish Restoration Plan was published as a NOAA Technical Memorandum dated April 2008 ("2008 Fish Restoration Plan"). The authors of the Fish Restoration Plan include representatives of NPS, NOAA Fisheries, USFWS, WDFW and the Hatchery Operators. The 2008 Fish Restoration Plan purports to describe the finalized plans for fish restoration before, during, and after the dam removal process.

The 2008 Fish Restoration Plan describes a significant role for hatcheries and hatchery fish to supplement or "restore" fish runs during and after the dam removal process without a clearly articulated adaptive management strategy to monitor and phase out such hatchery practices. The 2008 Fish Restoration Plan's discussion of hatchery activities includes significant artificial supplementation of fish stocks, outplantings of hatchery fish, and broodstocks. One example of the 2008 Fish Restoration Plan's hatchery operations is a maintenance program for the continued planting of non-indigenous Chambers Creek hatchery winter steelhead. Upon information and belief, the Hatchery Operators will play a significant role in the implementation of this component of the project.

Various scientific studies, technical memoranda, and agency documents highlight the serious ecological risks that hatchery fish pose to native salmonids. Artificial supplementation can lower reproductive fitness of native wild fish, increase competition for resources, cause interbreeding between native and non-native species, and expose native fish to diseases. Native salmonids will be even more vulnerable to the risks posed by hatchery practices due to the degraded environmental conditions caused by the dam removal process, such as large sediment loads. In 2010 correspondence with the Hatchery Operators concerning the Chambers Creek steelhead hatchery plans, scientists at NOAA Fisheries, NPS, and WDFW recognized the serious risks that hatchery fish pose to the survival and restoration of native salmonids. Despite the agencies' serious concerns about the use of hatchery fish in conjunction with the dam removal process and the Elwha River Fish Restoration Project, the 2008 Fish Restoration Plan formally approves these plans.

III. ESA Section 9 Violations.

The Hatchery Operators are in violation of section 9 of the ESA for causing take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout by approving, funding, and implementing the activities described in the 2008 Fish Restoration Plan. In addition to causing direct mortalities, the activities described in the 2008 Fish Restoration Plan will cause take by significantly disrupting the normal behavioral patterns of these species, including breeding, feeding, and/or sheltering patterns.

The hatchery operations described in the 2008 Fish Restoration Plan will result in take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout in a variety of ways. For example, supplementation of fish can cause take in the event that the returning adults have reproductive fitness that is lower than the original natural-origin (wild) adults. Studies on both spring Chinook and winter and summer-run steelhead show that there is a non-negligible risk of reduced fitness for returning adults. Indeed, recent studies involving winter-run and summer-run steelhead have shown that the reproductive success of naturally spawning progeny of supplementation hatchery fish whose parents were wild is significantly lower than wild fish.

Additionally, the 2008 Fish Restoration Plan includes proposals to transplant adult and/or juvenile hatchery offspring to the upper Elwha basin for release while also releasing hatchery juveniles into the lower river. Releasing hatchery juveniles into the lower river will create severe competition for food and rearing space for the migrants from the upper basin, resulting in take of ESA protected fish. Because the hatchery fish are and will continue to increase competition, reduce fitness, and disrupt the feeding and breeding of the native salmonids, the hatchery operations will cause take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout. These are just examples of the ways in which the activities described in the 2008 Fish Restoration Plan will result in take of protected species.

Despite the take that will result to ESA protected species from the activities described in the 2008 Fish Restoration Plan, the Hatchery Operators have not secured authorizations or exemptions that shield them from liability under section 9 of the ESA.

The activities described in the 2008 Fish Restoration Plan cause take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout. The Hatchery Operators are in violation of section 9 of the ESA for causing such take.

IV. Conclusion.

Under section 11(g) of the ESA, 16 U.S.C. § 1540(g), this letter provides the Hatchery Operators with sixty days notice of Wild Fish Conservancy, the Wild Steelhead Coalition, the Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a the Conservation Angler's intent to sue for violations of the ESA discussed herein. Unless the ongoing and/or imminent violations described above are corrected within sixty days, these organizations intend to file suit against the Hatchery Operators to enforce the ESA. During the notice period, we will be available to discuss effective remedies and actions that will assure future compliance with the ESA.

Very truly yours,

SMITH & LOWNEY, PLLC

By: _____
Brian A. Knutsen